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## *Damages in Wrongful Death Actions*

*Stanley B. Kent\**

IT IS AN ANCIENT TRUTH that the tort law is amoral in the sense that the degree of culpability of the defendant, assuming, of course, there is any culpability at all, is not a factor in determining damages. Nowhere is this better illustrated than in wrongful death cases where the jury is admonished to fix damages solely on the basis of the "pecuniary injury" that the survivors suffered as the result of the death.<sup>1</sup> Although this instruction represents the application to death cases of the compensation theory that is so familiar in ordinary injury cases, it seems almost inhumane in the context of death.

As the measure of damages in wrongful death cases is fixed by statute, only one variable exists: the definition of "pecuniary injury." It should be noted parenthetically that inflation might be considered a variable as well, but this is an extra-legal consideration and does not alter the rule that the jury is required to follow. Has the definition of "pecuniary injury" been liberalized over the years?

Before attempting to answer that question it is important to take note that death cases fall into two different categories. There are those cases in which the decedent was the breadwinner for the survivors. Here the economic consequences of death are easy to discern and comparatively easy to calculate. As will be seen, methods and formulas for calculation vary somewhat but, in the main, these cases present few problems. Far more difficult are those cases in which the decedent was partially or solely dependent on the survivors. Here the literal application of the "pecuniary injury" formula might appear to deny recovery altogether or, at the very least, to keep verdicts at a penurious level.

Considering first the situation in which the decedent was the dependent of the survivors, it is instructive to analyze three cases which span a period of 33 years, from 1923 to 1956. These cases make it evident that the interpretation of the statute is expanding and is infused with a new spirit of liberalism, even though the courts continue to adhere to the statute for determining damages—as indeed they must.

First in order is *Kennedy, Admr. v. Byers*, a 1923 wrongful death case of a ten year old boy.<sup>2</sup> The jury rendered judgment for the plaintiff but in what amount we are not told. The statute then in force was Sec.

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<sup>1</sup> ". . . The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. . . ." Ohio Rev. Code, § 2125.02. See, Oleck, *Cases on Damages*, c. 22 (1962).

<sup>2</sup> 107 Ohio St. 90, 140 N.E. 630 (1923).

10772 G. C., precursor of Sec. 2125.02, Ohio Revised Code and substantially the same in its wording. The judgment was reversed on appeal because the trial court instructed the jury that it could "take into account any pecuniary injury from loss of society, comfort and protection. . . ." <sup>3</sup> The Supreme Court quoted with approval the definition of "pecuniary loss" that is found in Bouvier's Law Dictionary: "A loss of money, or something by which money or something of value may be acquired." <sup>4</sup> So erroneous was the instruction to the jury, the court said, that

" . . . affirmance of this judgment would approve and sanction a radical departure from the rule of damages prescribed by statute, as interpreted and applied by our courts for many years, and might well be regarded as authority by trial courts to go still farther, and also suggest to juries that they might take into consideration many other such elements as mental pain and suffering, or sorrow, bereavement or distress of the beneficiaries." <sup>5</sup>

Repelled as one might be by the seeming inhumanity of this decision, it is nevertheless difficult to quarrel with it in the light of the statute. The fact is that the death of a ten year old is a financial gain to a family, not a loss. One might speculate that as an adult he would dutifully contribute to the support of his parents in their declining years, but speculation it would surely be and therefore not properly considered by the jury. Moreover, sorrow and bereavement have never been deemed to be measurable in money, although one might inquire why they are any less susceptible to measurement than physical pain and suffering in injury cases.

The plaintiff in this case made a rather ingenious argument based on one of the 1912 amendments to the Ohio Constitution. Before 1912, Ohio, like most states, had a specific dollar limit on the amount recoverable in wrongful death cases. That limit had been \$20,000.00, but the 1912 amendment forbade the legislature from enacting any ceiling on damages. <sup>6</sup> This being so, the plaintiff in the *Kennedy* case argued, juries are no longer circumscribed in their calculation of damages. The court's answer was that the Constitutional change had no such broad effect; it removed the dollar limit from verdicts, but in no sense did it alter the basic prescription that only pecuniary injury may be considered in arriving at verdicts. <sup>7</sup> The *Kennedy* case has never been expressly overruled, and yet, as later cases make clear, its narrow interpretation of pecuniary injury belongs to a parsimonious past.

<sup>3</sup> *Id.* at 91, 140 N.E. at 631.

<sup>4</sup> *Id.* at 92, 140 N.E. at 632.

<sup>5</sup> *Id.* at 99, 140 N.E. at 639.

<sup>6</sup> "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law." Ohio Const., Art. I, § 19a.

<sup>7</sup> *Kennedy, Admr. v. Byers*, *supra* note 2 at 96.

In the 1950 case of *Immel, Adm'r. v. Richards*,<sup>8</sup> the *Kennedy* case was cited, but, significantly, in the dissenting opinion; the majority opinion does not refer to it at all. The decedent in *Immel* was a nine month old infant, the liability was apparently undisputed, and the jury returned a \$5,000.00 verdict. It is important to note that after the jury had commenced its deliberations, it submitted two written questions to the trial judge. The first question concerned the defendant's insurance coverage; the Court, of course, admonished the jury that it was not to concern itself with insurance at all. The second question asked what portion of the medical or funeral expenses the defendant had paid or offered to pay; the Court answered that as no evidence had been offered on the subject of medical and funeral expenses, this matter, too, was not to be considered. After receiving these answers which, to a lay jury, were probably somewhat mystifying, the \$5,000.00 verdict was agreed to and judgment duly entered.

Four of the seven judges of the Supreme Court sustained the verdict, one dissented on the ground that the record clearly indicated a verdict based on the supposed amount of casualty insurance rather than on pecuniary injury, and two dissented because they felt the sum awarded was simply excessive.

The majority opinion observed at the outset that the Court had never made an authoritative statement about damages in infant death cases. To fill this gap the court cited passages from a number of text writers, cases from foreign jurisdictions, and two Ohio cases, *Ochsner, Adm'r. v. Cincinnati Traction Company*<sup>9</sup> and *Karr, Adm'r. v. Sixt*.<sup>10</sup> It concluded, from these several sources, that there is a presumption of pecuniary injury to those persons legally entitled to services, earnings, or support from the decedent. It conceded that it would be impractical to offer direct evidence of any specific loss occasioned by the death of a child of such tender years; but, it argued, to hold that without such proof the plaintiff could not recover at all would have the effect of making the wrongful death statute nugatory in cases of this description. This section of the opinion then concludes with the simple statement:

"We are of the opinion that by the death of this child the parents sustained a pecuniary loss."<sup>11</sup>

We encounter a reference to *Kennedy* in this case in Judge Taft's rather sharply worded dissent. While admitting that the *Kennedy* doctrine is a "cold-blooded calculating measure of human life,"<sup>12</sup> Judge Taft reiterates its rule and then stated the familiar proposition that if

<sup>8</sup> 154 Ohio St. 52, 93 N.E. 2d 474 (1950).

<sup>9</sup> 107 Ohio St. 33 at 34, 140 N.E. 644 at 647 (1923).

<sup>10</sup> 146 Ohio St. 527, 67 N.E. 2d 331 at 332 (1946).

<sup>11</sup> *Immel, Adm'r. v. Richards*, *supra* note 8 at 56, 93 N.E. 2d at 478.

<sup>12</sup> *Id.* at 59, 93 N.E. 2d at 481.

factors other than pecuniary loss are to be considered in wrongful death cases, it is the General Assembly, not the Courts, that should so decree.

A comparison of the majority and dissenting opinions in the *Immel* case reveals that the difference between them centers around the character of the proof demanded to demonstrate pecuniary injury. The majority opinion made due obeisance to the statute, but sustained the verdict on the basis of a presumption; the dissenters considered the verdict to be based on "conjecture, guess, random judgment, or supposition. . . ." <sup>13</sup> This case unmistakably stands for the principle that a presumption of pecuniary loss will be acceptable and that a \$5,000.00 verdict for the death of an infant is not excessive. It is a radical departure from *Kennedy*, and has had a profound effect on later cases. In *Crider, Adm'r. v. Columbus Plastic Products, Inc.*,<sup>14</sup> the *Immel* case was cited to sustain a verdict of \$10,000.00 where the decedent was an eleven year old boy. Three judges of the Court of Appeals concurred with only the very briefest discussion of the defendant's claim of excessiveness. The opinion announced three principles: that, except in the case of the death of the breadwinner, the verdict is always conjectural; that the jury may give such damages as it *may think proportioned* to the pecuniary injury; and that, absent evidence in the record of passion and prejudice, a reviewing court will not substitute its own speculation for the opinion of the jury.

Although none of the opinions in this area touch upon the matter directly, it must be evident that the value of money plays a crucial—perhaps a decisive role—both in the escalation of damages awarded and the willingness of trial and reviewing courts to uphold the verdicts. The strictures of the statute notwithstanding, there would be something inherently preposterous in a judicial system which regularly and routinely permits juries to award thousands of dollars for injuries transiently and minimally disabling, and at the same time overthrow verdicts when a human life is taken unless those verdicts are so small as to be penurious. This, it is suggested, is a major, if unstated, reason for tolerance of verdicts which a few decades ago would have been thought vertiginously high.

In this same line of cases, but distinguishable from the preceding three because a pecuniary loss was plainly proved, is *Flory, Adm'r. vs. N. Y. C. Rd. Co.*<sup>15</sup> The decedent, although only eighteen years of age, was an accomplished watchmaker and operated a jewelry store. His father, who had trained his son, ran a separate jewelry store but the two establishments made their purchases together to obtain lower whole-

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<sup>13</sup> *Id.* at 62, 93 N.E. 2d at 484.

<sup>14</sup> 90 Ohio L. Abs. 605, 190 N.E. 2d 63 (1956).

<sup>15</sup> 170 Ohio St. 185, 163 N.E. 2d 902 (1959).

sale prices and the father, at times, handled the overflow business from his son's store. In the light of such evidence, a verdict of \$10,000.00 for the son's wrongful death seems fully justified and was upheld.

This case, however, had a second feature to it. Before 1955, it was not possible to join a cause of action for wrongful death and another for personal injuries in the same petition. As damages for wrongful death are claimed by the personal representative of the estate and distributed to the next of kin in accordance with the demonstrated pecuniary loss, such damages do not become a part of the decedent's estate.<sup>16</sup> Contrariwise, damages awarded for personal injuries become assets of the estate so that distribution is determined either by will or the laws of intestacy.<sup>17</sup> This means that the plaintiffs are not necessarily the same persons, or, at the very least, if those entitled to inherit and the next of kin are identical, they make their claims in separate and distinct legal capacities. Joinder of these two causes of action is now permissible provided that both arise from the same wrongful act.<sup>18</sup>

The *Flory* case<sup>19</sup> was decided after the date of the joinder statute. In addition to the \$10,000.00 verdict for wrongful death, the jury also awarded \$7500.00 for pain and suffering. Indeed, the opinions, both majority and dissenting, were largely devoted to a discussion of the injury aspect of the case. The decedent lived for ten hours after the collision and the evidence was in some conflict as to his consciousness, and, hence, his capacity to feel pain, during this time. The court, over a vigorous dissent, found that there was sufficient credible evidence of sensitivity to pain and upheld the verdict.

If some speculation may be permitted, is it possible that the *Flory* jury, taking seriously the trial court's admonition that only pecuniary injury was to be considered so far as wrongful death damages were concerned, compensated for this limitation by awarding \$7500.00 for ten hours of pain and suffering? So far as this cause of action is concerned, precise calibration of the pecuniary loss is not necessary. The jury's latitude and discretion are almost unbounded. It is therefore apparent that, in those cases in which there are two causes of action, juries may administer a rough brand of justice. They can meticulously follow the trial courts' instructions and award small sums for wrongful death but, at the same time, salve their conscience with a generous award for pain and suffering. Except in rare circumstances, the beneficiaries will be the same persons. An examination of the reported cases, however,

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<sup>16</sup> Ohio Rev. Code, § 2125.03.

<sup>17</sup> *Ibid.* § 2305.21; *Adams, Adm'x. v. Malik*, 106 Ohio App. 461, 155 N.E. 2d 237 (1957).

<sup>18</sup> Ohio Rev. Code, § 2309.05 (K); *Bell v. Cincinnati Transit Co.*, 108 Ohio App. 229, 9 Ohio Op. 2d 237, 155 N.E. 2d 698 (1958).

<sup>19</sup> *Flory, Adm'r. v. N.Y.C. R.R. Co.*, *supra* note 15.

indicates that comparatively few wrongful death cases carry a personal injury cause of action, so that this method of evading the dictates of the statute is only occasionally available.

To what extent inflation influences a jury or a court in these cases is hard to say. The effect may be subtle, even subliminal, but it is certain to play some part in the deliberations and in the court's review of the verdict. In the first decade or so of this century, verdicts of \$1,000.00 or less in cases of the wrongful death of minors were commonplace;<sup>20</sup> nor was it unheard of for a court to order substantial remittiturs when verdicts as low as \$2500.00 were returned.<sup>21</sup> To place such meager value on the life of a minor today would be unthinkable and, indeed, might be construed almost as an insult to the bereaving survivors. All that can be said with certainty is that a trend is discernible in wrongful death cases where the decedent is not the financial mainstay of the family, that its thrust is in the direction of larger verdicts, and that they are more likely to be sustained when they are attacked as excessive.

Discussion of damage trends in wrongful death cases where the decedent is the breadwinner has been reserved until this point, but certainly not because these cases are considered of less importance. On the contrary, when the survivors are dependent on the labor of the decedent for their very sustenance, it becomes unnecessary to resort to presumptions or to fanciful interpretations of pecuniary injury. A few figures and the multiplication tables vividly demonstrate how acute is the injury suffered by the survivors. Trends in these cases closely parallel those discernible in personal injury cases generally. Such obvious factors as the soaring cost of living and the shrinkage of the dollar, together with much higher average earnings, combine to influence juries profoundly. Although a quarter of a million dollars still seems an astronomical amount, a man 30 years of age with an annual income of \$10,000.00 will achieve those total earnings by the time he is 55. Sustained earnings at high levels over such a period of time is today by no means exceptional.

But for several obvious reasons \$250,000.00 paid and received at one time is not to be equated with the same sum earned over many years. The death has removed from the family one of the persons who would have himself consumed a part of the income. Also, evidence of earnings usually comes in the form of gross figures which do not reflect the ordinary payroll deductions. Nor can the earning power of money be disregarded; thus, \$250,000.00 so conservatively invested that

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<sup>20</sup> *Ashtabula Rapid Transit Co. v. Dagenbach*, Adm'r, 11 Ohio C. Dec. 307 (1900), *aff'd* 67 Ohio St. 512, 67 N.E. 1100; *Toledo Ry. & Light Co. v. Wettstein*, Adm'r, 14 Ohio C.C.R. (n.s.) 441, 33 Ohio C.C.R. 15 (1908), *aff'd* 79 Ohio St. 439, 87 N.E. 1142; *Becker v. Howanyecz*, Adm'x, 18 Ohio C.C.R. (n.s.) 19, 42 Ohio C.C.R. 561 (1910).

<sup>21</sup> *Campbell v. Tarr*, Adm'x., 18 Ohio C.C.R. (n.s.) 323, 43 Ohio C.C.R. 66 (1911).

it will yield a 4 per cent return will produce \$10,000.00 annually with no incursion into the principal. Finally, wrongful death damages are not subject to federal income taxes.

Recent Ohio cases take these various factors into consideration. Thus in *Bartlebaugh v. Penn. Rd. Co.*,<sup>22</sup> the verdict was \$225,000.00 but the Supreme Court ordered a remittitur of \$75,000.00. Here the decedent was 23 years old and his annual earnings about \$2850.00. The opinion did not specify the life expectancy figures offered in evidence but concluded that a lump sum of \$41,195.00 (calculated by some tables), or at the very most \$57,617.00 (by other tables) would be the sum necessary to provide, for the life of the survivor, an annual sum equivalent to the decedent's earnings. Even taking the larger figure, the Court concluded there is still a difference of over \$92,000.00 between the \$150,000.00 award to which the verdict was reduced and the sum required to reproduce the decedent's annual income. The Court, despite its remittitur, evidently recognized other elements of loss not so easily calculable in money. For if these meticulous actuarial computations satisfy the pecuniary injury, what injury or loss is compensated for by the \$92,000.00 excess? Incidentally, this 1948 case was the first one in the history of the Supreme Court in which a modification of a judgment was ordered.

Somewhat less generous was the jury in *Spence, Adm'x. v. Commercial Motor Freight, Inc.*<sup>23</sup> Although the opinion yields few facts about the decedent, we are told that his annual income was in excess of \$3,000.00. The award was \$42,000.00, only about one-half of what would have been required to furnish an equivalent life-time income for the survivors.

The gap between gross and net income was the central point of *Bergfeld, Adm'x. v. New York, Chicago, and St. Louis Rd. Co.*<sup>24</sup> The defendant attempted to cross-examine the plaintiff's actuary on the deductions from his pay for railroad retirement and withholding taxes on the ground that the decedent's widow, after all, lived on a percentage of his take-home pay.<sup>25</sup> But plaintiff's objection to this line of cross-examination was sustained. The court also refused to give defendant's offered instruction to the jury that damages would be exempt from federal income and estate taxes.<sup>26</sup>

This case followed *Maus v. New York, Chicago, and St. Louis Rd. Co.*,<sup>27</sup> which also upheld the trial court's refusal to instruct the jury on the tax exempt status of its award. But the Court said:

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<sup>22</sup> 150 Ohio St. 387, 82 N.E. 2d 853 (1948).

<sup>23</sup> 99 Ohio App. 143, 127 N.E. 2d 427 (1954).

<sup>24</sup> 103 Ohio App. 87, 144 N.E. 2d 483 (1956).

<sup>25</sup> *Id.* at 99, 144 N.E. 2d at 495.

<sup>26</sup> *Id.* at 100, 144 N.E. 2d at 496.

<sup>27</sup> 165 Ohio St. 281, 135 N.E. 2d 253 (1956).



"Perhaps it should be noted that this case does not present the question as to what a trial judge's response should be if and when the jury asks him whether it should consider the matter of income taxes."<sup>28</sup>

Also, three judges joined in a special concurrence saying that a charge warning the jury not to consider income tax liability on the award it might make would be acceptable.<sup>29</sup> The refused charge in this case requested the jury to take the fact of exemption in consideration in arriving at the amount of its verdict.

If this verbiage can be untangled, it appears to say this: a court, if asked to do so by counsel, will tell the jury that it should not worry about taxes the plaintiff may be required to pay on the award. On the other hand the court, even if asked to do so by counsel, will not tell the jury that the plaintiff will not be required to pay taxes. Assuming that juries are conscious of taxes and believe, if erroneously, that plaintiffs will be compelled to pay them, the effect of these rulings appear to favor plaintiffs. Some juries may add a sum to the verdict so that their awards will not be diminished by taxes; but, absent specific advice that the award will not be diminished it seems highly unlikely that they will reduce the award.

It is understandable that neither pensions nor Workmen's Compensation should be factors reducing the size of verdicts. The principle that a tortfeasor's duty to respond in damages is not to be mitigated by such other arrangements as his victim may have made or by such benefits as the law provides is sound, entrenched, and no longer challenged. Less clear is a principle recently reiterated or perhaps enlarged, in *Helmick v. Netzley*.<sup>30</sup> The widow had remarried before trial. At pre-trial, the court sustained her motion that she be sworn and identified throughout the trial by her former name, that is, as the wife of the decedent. Counsel for the defendant was admonished not to refer to her by her present name nor in any way to indicate her remarriage. The court noted that remarriage is not admissible in diminution of damages, and this rule would be subverted if the jury knew the truth. The decision is an extension of earlier rulings on the same point. While there is no doubt that the jury should be instructed on the immateriality of her marital status, its deliberate and planned concealment seems to reflect adversely on the intelligence of jurors and their commitment to follow the court's instructions of law. In any event, the case is a further example of the trend in cases of this sort.

In cases where the decedent was the chief support of the family, and, in particular, where he was a father, juries and courts may and do

<sup>28</sup> *Id.* at 285, 135 N.E. 2d 257.

<sup>29</sup> *Ibid.*

<sup>30</sup> 12 Ohio Misc. 97, 40 Ohio Op. 2d 104, 229 N.E. 2d 476 (1967).

recognize factors other than earnings in calculating pecuniary loss. It is obvious that a father's counsel, guidance, and protection are of pecuniary value and that children deprived of these benefits may very well have suffered an actual and demonstrable financial loss.

Certain general conclusions may be drawn from an overview of wrongful death case damage trends. First, verdicts in this phase of tort law are rising although probably not so high nor so fast as in personal injury cases not involving death. Although judicial interpretation of damage limitations are clearly more liberal, the statute must still be reckoned with and continues to depress verdicts to some extent. The time may come when the General Assembly will see fit to accord the same recognition to the mental suffering that follows upon the death of a member of the family as the law now does to the pain and suffering which are sequels to physical injury. Should that happen, evidence of pecuniary injury, in many cases, will be introduced merely as "specials," the true substance of the damage claim being the grief caused by the death of the loved one. The evidentiary problems that would ensue are fearsome to contemplate, but similar problems have been met and overcome in ordinary personal injury suits. For the present, the old saw that it is often cheaper for the tortfeasor to kill his victim than to maim him remains substantially true.